IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

C. A. DURR PACKING COMPANY, Inc.,
Petitioner,

vs.

FRANK J. SHAUGHNESSY, as Collector of Internal Revenue for the 21st District of New York.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

1. The heart of respondent's argument seems to be that Durr's right to the processing tax refund was "contingent" upon events such as the filing of a claim for refund, presenting supporting facts and figures, and upon the Commissioner's allowance of the refund (Resp. Br. pp. 9-11), arguments which had been urged and rejected in the *Continental Tie* (286 U. S. 290), *Dumari* (142 F. [2d] 897), and Federal Control cases.[1] If such a test of accrual should apply, no payment requiring administrative determination or allowance could accrue in advance of administrative action, and this does not appear to be the law as those cases demonstrate.

Durr doubtless *could* have litigated the processing tax claim through a Board of Review and the Appellate

[1] *Southern Rwy. Co. v. Commr.*, 74 F. (2d) 887 (C.C.A. 4); *Helvering v. Gulf M. & N. Rwy.*, 71 F. (2d) 953 (C.C.A., D. C.) affd. 293 U. S. 295; *Helvering v. St. Louis Southwestern Rwy.*, 66 F. (2d) 633 (C.C.A. 8), cert. den. 292 U. S. 626; *Commr. v. Midland Valley Rwy. Co.*, 57 F. (2d) 1042 (C.C.A. 10); *Commr. v. Old Dominion Steamship Co.*, 47 F. (2d) 148 (C.C.A. 2).

Courts (Re p. Pr. pp. 10-11), and thereby perhaps *could have made* its right to refund contingent upon the result of actual litigation. It did not do so, however, but accepted the refund as allowed by the Commissioner. Surely the complete absence of a contest and litigation cannot be deemed equivalent to actual litigation, making this case "comparable" to *Lucas v. American Code Co.*, 280 U. S. 445, as respondent suggests (Resp. Br. pp. 10, 13).

2. Respondent also argues that the amount of Durr's refund was not ascertainable with reasonable accuracy until the Commissioner made his determination in 1940 (Resp. Br. pp. 11-12). The amount of processing tax absorbed by Durr was ascertainable at some time—this is demonstrated beyond cavil by the fact that the Commissioner allowed the refund in 1940. Since every factor was fixed during 1936, which (under Sec. 907 of the 1936 Revenue Act) determined the amount of tax absorbed, the refund was fully as ascertainable in 1936, as it was in 1940, by any objective application of these ascertained factors. Whether it required one year or five years to process the claim is hardly material to the time it accrued as income. The time of accrual should be governed by the objective facts, not by a subjective test turning on the state of mind of the Commissioner.

Nor does it appear material that the Commissioner's allowance of the refund took the form of a settlement agreement with Durr on form 870 (see Exhibit 12). A similar circumstance appears to have been present in the *Continental Tie* case (286 U. S. 290), as disclosed by the briefs and record in that case, though not mentioned in the Court's opinion, and it was there treated as without significance.

3. Reference to the *Continental Tie*, *Dumari* and Federal Control cases, will disclose that, in substance, virtually all

the arguments presented in respondent's brief were urged in one or more of those cases, and were uniformly rejected by the Courts.

4. We respectfully submit that the confusion concerning time of accrual in income tax administration is illustrated, and will probably be increased, by the decision below in this case. Review by this Court would appear desirable to secure clarification, to ensure uniform and consistent administration of the federal income tax laws, and to correct a decision probably contrary to the authorities listed in our petition (pp. 4-5).

September, 1951.

Respectfully submitted,

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